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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-6740 ORIGINAL COPY

ROBERT BULLINGTON, Petitioner

vs.

STATE OF MISSOURI, Respondent

REPLY TO RESPONSE OF THE STATE OF MISSOURI

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IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT BULLINGTON, Petitioner	)	
vs.	)	No. 79-6740
STATE OF MISSOURI, Respondent	)	

REPLY TO RESPONSE OF THE STATE OF MISSOURI

TO: THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Robert Bullington, Respondent herein, by Richard H. Sindel, attorney, hereby replies to the Response of the State of Missouri filed in this cause.

ARGUMENT

The State in its reponse has failed to grasp, address or refute Petitioner's compelling reasons for granting the Writ of Certiorari. In an attempt to circumvent those issues presented by Petitioner, the State has filled their response with blanket statements unsupported by logic or law. Their "wait and see" approach to these life-threatening issues demands a reply.

Petitioner did indeed request a new trial of the jury's determination of guilt, but he never requested a new sentencing trial or reversal of the jury's verdict that he should not die. He never complained in post-trial motions about the procedures, instructions or rulings of the trial court at the sentencing trial. Petitioner should, by the trial court's decision, be subject to a retrial, but not at the cost of his life.

The State argues that to avoid the gas chamber defendant has invented a new crime, that of Capital Murder Punishable by Death. This invention does not belong to the Petitioner and the "fiction" the State refers to has received not only the support of the trial judge, the three judge panel of the Missouri Court of Appeals, and two dissenting

justices of the Missouri Supreme Court, but also that of the Court of Appeals for the Sixth Circuit. In Gully v. Kunzman, 592 F.2d 283 (C.A. 6th 1969) Judge Merritt held that the State would not be prohibited from seeking the death penalty at defendant's retrial where the penalty had not been sought in the first trial. This failure on the part of the State, reasoned Judge Merritt, could not be interpreted as an implied acquittal of the greater offense of Capital Murder Punishable by Death. However, in addressing this argument the Court stated as follows:

> "We do not think this analysis is farfetched, since, under the new scheme, a defendant convicted of a capital offense may not be sentenced to death except upon a finding, 'beyond a reasonable doubt,' of certain statutorily-prescribed 'aggravating factors'. These 'factors' might be conceived of as elements of the 'greater' crimes of 'capital murder/armed robbery' rather than simply as guides for the exercise of the sentencing authority's discretion to fix an appropriate punishment for one convicted of 'simple' wilfull murder and armed robbery".

The Supreme Court of New Jersey also discussed Petitioner's "fiction" in State v. Wolf, 216 A.2d 586, 590 (N.J. 1966), wherein the Court held that the State could not seek the death penalty on defendant's new trial basing its decision on "...procedural policies, which are the essence of the administration of criminal justice."

The State argues that by granting certiorari, the court would be granting to every defendant in a capital case, the pre-trial right to review the trial court's rulings. This argument has no merit and ignores that which the State is forced to concede; the judgment in State ex. rel. Westfall v. Mason, is a final judgment reviewable by this court and not an interlocutory appeal.

The State's argument further ignores the inescapable logic that if the State cannot under the United States Constitution relitigate and seek the death penalty at Petitioner's retrial, then the jury should not and must not be death-qualified. To death-qualify a jury where a sentence of death cannot be imposed unduly and impermissibly deprives the defendant of a jury of his peers, constitutionally qualified, and capable of determining the issues presented at trial. (Why should an entire segment of the population, those people opposed to the death

penalty, be denied to the defendant and omitted from the trial if their scruples would not interfere with their duties as jurors? Does the State contend that it should be allowed to death-qualify all jurors in all homicide cases regardless of the sentence that can be imposed legally?)

The State argues that the Petitioner has "threatened" the court with reassertion of the points raised in his petition at a later date. The principles cited in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) and other cases cited by the Petitioner are not threats but law. Undoubtedly, these issues will persist until there is a final determination. To assert that this statement of fact is a "threat" is unwarranted and unnecessary. The State, while attempting to hide behind the skirts of Chaffin, never addresses itself in its response or in any of its briefs to the fundamental and obvious fact that a bifurcated trial punishable by death is a creature distinct from the holdings and facts in Chaffin or Stroud, and as such will remain a point of dispute until resolved by this Court.

The State dismisses Petitioner's argument concerning the various conflicts between the states by contending that they are not substantial or were decided pre-Chaffin.

No where does the State contend that Chaffin affected or changed the law in those states. No where is it reflected that those decisions cited by defendant have been overruled post-Chaffin. In Alaska, Arkansas, California, Florida, Georgia, Illinois, Indiana, Minnesota, New Jersey, Oregon, Pennsylvania, and West Virginia, Petitioner would not be subject to the penalty of death on retrial. Shagloak v. State, 597 P.2d 142 (Alaska 1979)(chilling effect); Rush v. State, 395 S.W.2d 3 (Ark. 1965); Sneed v. State, 225 S.W. 895 (Ark. 1923), Ark Stat. Ann, Section 43-2153; Crane v. Superior Court, 165 Cal. Rptr. 249 (Cal. App. 1980); People v. Johnson, 113 Cal. Rptr. 303 (Cal. App. 1974); Robertson v. State, 258 So.2d 257 (Fla. 1971); Hall v. State, 244 S.E.2d 833 (Ga. 1978); People v. Pierce, 400 N.E.2d 62 (Ill. App. 1980), Ill. Rev. Stat. 1977 Ch. 38, Par. 1005-5-4; Ballard v. State, 318 N.E.2d 798

(Ind. 1974); State v. Holmes, 161 N.W.2d 650 (Minn. 1968); State v. Wolf, 216 A.2d 586 (N.J. 1966); State v. Martin, 594 P.2d 1276 (Ore. App. 1979); State v. Turner, 429 P.2d 565 (1967), State v. Sterling, 537 P.2d 578 (1975); Commonwealth v. Wright, 282 A.2d 266 (Pa. 1971), Commonwealth v. Caye, 244 A.2d 44 (Pa. 1972); Commonwealth v. Furman, 326 A.2d 891 (Pa. 1974); State v. Eden, 256 S.E.2d 868, 875 (W.Va. 1979) (holds that fear of harsher penalty burdens or chills defendant's right to appeal).

Even those states which would allow Missouri to proceed along the lines it intends recognize the need for a final resolution of the conflict. In State v. Fitzpatrick, 606 P.2d 1343, 1370 (Mont. 1980), the dissent accurately documents the various conflicting decisions that currently exist and argues most effectively those propositions promulgated by your Petitioner, characterizing this need for resolution as a "...question crying for an answer." It is a life crying for a future; a system crying for direction.

The State argues that Godfrey v. Georgia, _____ U.S. _____, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), cannot be dispositive because Petitioner's trial transcript is not available for review. It should be pointed out that the State did not disagree with Petitioner's concise summary of the facts and evidence at the trial and that the transcript of the first trial has been prepared and is available for review.

Finally, the State contends that Petitioner's argument concerning the "chilling effect" of the Missouri Supreme Court's decision has been decided by Chaffin. The choice alloted to defendant in Chaffin, although troublesome was not infinite, although difficult was not impossible, although risky was not suicidal. He did not have to choose between breathing air and breathing poison, between the law and his right to live, between constitutional guarantees and dust. That grisly choice, that unspeakable dilemma, that impossible calculation, confronts your Petitioner as well as all other defendants in Missouri and other states who have convinced the jury beyond a reasonable doubt that the sentence of death should not be imposed only to have to decide whether to once

again risk the executioner or forego their right to appeal that is freely granted to every other defendant in every other state. Those defendants so situated and your Petitioner face the choice that presented itself to the defendant in Fay v. Noia, wherein the Court stated: "...For Noia to have appealed in 1942 would have been to run a substantial risk of electrocution. His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence. ...He declined to play Russian roulette in this fashion." 372 U.S. at 439-40.

It is for these reasons and those contained in his original Petition that Robert Bullington respectfully prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been mailed to James J. Cook, Assistant Prosecuting Attorney, St. Louis County, 7900 Carondelet, Clayton, Missouri, 63105, this 1st day of October, 1980.

Subscribed and sworn to before me this 1st day of October, 1980.

NOTARY PUBLIC

My Commission Expires:

LINDA S. SOELL
MY COMMISSION EXPIRES APRIL 10, 1982